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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 597

COLLIN & GISSEL (Ludwig Baer),

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF

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THE UNITED STATES,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Collin & Gissel (Ludwig Baer), respectfully prays for a writ of certiorari directed to the United States Court of Customs and Patent Appeals to bring before this court for review the judgment of the United States Court of Customs and Patent Appeals dated June 9, 1941, in the case entitled "The United States, Appellant v. Collin & Gissel (Ludwig Baer), Appellee, No. 4312" reversing the judgment of the United States Customs Court, Third Division, which affirmed the judgment of Judge Dallinger

of the United States Customs Court. A certified transcript of the record in the case, with the necessary additional copies thereof, has been filed in compliance with Rules 38 and 42 of the rules of this court.

Jurisdiction.

The judgment below was entered June 9, 1941.

The jurisdiction of this court is invoked under Section 195 of the Judicial Code, as amended by the Act of June 17, 1930, c. 497, Title IV, § 647, 46 Stat. 762 (28 U. S. C. A. § 308).

Summary and Short Statement.

The petitioner imported a certain beer barrel washing machine at the Port of Houston, Texas. The United States Appraiser at that port appraised the machine on the basis of its alleged cost of production in accordance with Section 402 (f) of the Tariff Act of 1930 (19 U. S. C. A. § 1402 (f)). The trial judge held, and his judgment was affirmed by the Appellate Term of the United States Customs Court, that neither foreign value nor export value existed for the machine, but that United States value, as defined in Section 402 (e) of the Tariff Act of 1930 (19 U. S. C. A. § 1402 (e)), was the proper dutiable basis of appraisement.

It was agreed by and between counsel before the United States Court of Customs and Patent Appeals that there was neither foreign value nor export value for the imported merchandise, and that if United States value existed, as found by the United States Customs Court, it was the proper basis of appraisement in accordance with Section 402 (a) (2) of the Tariff Act of 1930 (19 U. S. C. A. § 1402 (a) (2)).

Section 402 (f) of the Tariff Act of 1930 (19 U. S. C. A. § 1402) reads as follows:

"SEC. 402. VALUE.

(a) *Basis.*—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 336 a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

(b) *Review of Appraiser's Decision*—A decision of the appraiser that foreign value, export value, or United States value can not be satisfactorily ascertained shall be subject to review in reappraisement proceedings under Section 501; but in any such proceeding, an affidavit executed outside of the United States shall not be admitted in evidence if executed by any person who fails to permit a Treasury attaché to inspect his books, papers, records, accounts, documents, or correspondence, pertaining to the value or classification of such merchandise.

(c) *Foreign Value*—The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(d) *Export Value*—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(e) *United States Value*—The United States value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale, packed ready for delivery, in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise, in the usual wholesale quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery, a commission not exceeding 6 per centum, if any has been paid or contracted to be paid on goods secured otherwise than by purchase, or profits not to exceed 8 per centum and a reasonable allowance for general expenses, not to exceed 8 per centum on purchased goods.

(f) *Cost of Production*—For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

(g) *American Selling Price*—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article."

During the year of importation of the instant machine, the petitioner imported and sold some 21 similar machines. The record shows that at all times during the year the petitioner freely offered such machines for sale to all purchasers in the United States (R. 9, 19-20). It also appears that upon the date of exportation of the machine in question, July 11, 1934, no such or similar imported machine was held in stock in the United States.

The United States Court of Customs and Patent Appeals held that inasmuch as there was no such or similar machine, imported into the United States previous to the date of exportation of the involved machine, which was being freely offered for sale at such time (all previously imported machines having been already sold), there was no basis upon which United States value could be determined.

It was the contention of the importer before that court, and it is here the single claim of the petitioner, that the word "imported" in the statutory definition of United States value does not require that a stock of such or similar imported merchandise be maintained in the United States at the date of exportation of the merchandise to be appraised, in order for United States value to exist, but that it is sufficient if such imported merchandise, as contrasted with domestic merchandise, has been freely sold and was being freely offered for sale to all purchasers in the United States as of the date of exportation of the involved merchandise.

Question Presented.

The sole question is:

Whether in the statutory definition of United States value the word "imported" as used in the clause "the price at which such or similar imported merchandise is freely offered for sale" is used to differentiate from "domestic", or means physically imported and present in the United States.

Reasons for Granting the Writ.

1. The United States Court of Customs and Patent Appeals has decided an important question of Federal law which has not been, but should be, settled by this court. Its decision so limits the applicability of United States value as a basis of appraisement of imported merchandise,

contrary to the probable intent of the Congress, as practically to destroy its use.

2. If the construction placed by the United States Court of Customs and Patent Appeals upon the statutory definition of United States value is permitted to stand as correct, the Government officials appraising merchandise will have great difficulty in determining the existence or nonexistence of United States value, to the probable detriment of the revenue; importers of merchandise will find it practically impossible to determine whether or not their importations can be entered on the basis of United States value; and the great majority of merchandise which has heretofore been appraised on the basis of United States value must be appraised on the basis of cost of production in the foreign country, which basis is the most difficult of all to ascertain with any degree of accuracy, and which was considered by the Congress as the least satisfactory method for valuation of imported merchandise, only to be used as a last resort.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Customs and Patent Appeals, commanding said court to certify and send to this Court on a day to be designated, a full and complete transcript of the record of all proceedings of the Court of Customs and Patent Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Customs and Patent Appeals be reversed; and that the judgment of the United States Customs Court be affirmed and reinstated.

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Petitioner.

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BRIEF IN SUPPORT OF THE PETITION

Opinions Below.

The opinion of Judge Dallinger of the United States Customs Court is reported as Reappraisement Decision No. 4580, United States Customs Court Reports, Vol. 2, pages 957-965 (R. 87-95). The opinion of the Third Division of the United States Customs Court is reported as Reappraisement Decision No. 4723, United States Customs Court Reports, Vol. 4, pages 622-627 (R. 100-106). The opinion of the United States Court of Customs and Patent Appeals is reported as Customs Appeal Decision 176, 29C. C. P. A. * * * It is printed as an appendix hereof.

Statement of the Case.

The principal facts pertinent to the single question involved are stated in the Petition, *ante*, pages 2 to 6.

Specification of Errors.

The United States Court of Customs and Patent Appeals erred:

(1) In finding and holding, as a matter of law, that the word "imported" as used in the clause "the price at which such or similar imported merchandise is freely offered for sale" in the definition of United States value requires that such or similar previously imported merchandise be offered from stock, physically available in the United States on the date of exportation of the merchandise being appraised, in order for United States value to exist;

(2) In finding and holding, as a matter of law, that since offers to sell such or similar imported machines in

the United States, at or prior to, the date of exportation herein were for machines imported thereafter, no statutory United States value existed for the involved merchandise;

(3) In not finding and holding, as a matter of law, that the use of the word "imported" in the clause "the price at which such or similar imported merchandise is freely offered for sale" in the definition of United States value, means that the selling price of imported, and not domestic, merchandise shall be the basis of such value;

(4) In reversing the judgment of the United States Customs Court.

Summary of Argument.

The points of argument follow the reason for granting the writ as set forth, *ante*, pages 6 to 7.

POINT I

The decision of the court below is apparently contrary to the intent of Congress.

In the enactment of the Tariff Act of 1930, as in the Tariff Act of 1922, the Congress provided alternative methods for the valuation of imported merchandise. Merchandise is first appraised at its foreign value or export value, whichever is higher. If neither of these values can be ascertained, United States value is used. Only if none of these three values can be ascertained is resort made to cost of production.

The statute defines these four methods of ascertaining the value or cost of imported merchandise, that is, of the imported merchandise to be appraised. United States value, which is here in question, is based upon the freely offered price of imported merchandise in this country. Congress originally contemplated using the freely offered

price in this country of either imported or domestic merchandise, which was such as or similar to that to be appraised. House of Representatives Report No. 7, 71st Congress, 1st Session, page 168. Senate Report No. 37, 71st Congress, 1st Session, pages 70-71. By a later Senate amendment the use of the domestic wholesale selling price of a comparable domestic article, as a basis for United States value, was eliminated, and the House receded. Senate Document No. 138, 71st Congress, 2nd Session, page 112, Amendment No. 1161.

It definitely appears from the foregoing that Congress wished United States value to be founded upon the price in the United States of such or similar imported merchandise, but not upon the price of domestic merchandise. Nowhere in the history of this legislation was there any indicated intent to require that the merchandise used as the basis of valuation be imported prior to, and on hand in the United States at, the date of exportation of the merchandise to be appraised.

Under earlier statutes, United States value was differently defined. Section 11 of the Act of June 10, 1890 as amended by Section 32 of the Act of July 24, 1897 (26 Stat. 136 as amended by 30 Stat. 211-213) provided in part:

> "It shall be lawful for appraising officers, in determining the dutiable value of such merchandise, to take into consideration the wholesale price at which such or similar merchandise is sold or offered for sale in the United States, due allowance being made for estimated duties thereon, the cost of transportation, insurance, and other necessary expenses from the place of shipment to the United States, and a reasonable commission, if any has been paid, not exceeding 6 per centum."

In the case of *Beer* v. *United States,* 1 Ct. Cust. Appls. 484, Treasury Decision 31526, the imported merchandise

had been appraised in accordance with this provision of the statute. The importer claimed that the language of the statute excluded the right of appraising officers to take into consideration the wholesale price at which the precise merchandise was sold. In overruling this contention, the United States Court of Customs Appeals said:

> "No better test, certainly no fairer test to the importer, could have been had as a basis of proceeding under this law than the wholesale price of the precise importation as sold by the importer himself, and that we deem within the very language of the statute authorizing the appraiser to take into consideration the wholesale price of 'such' merchandise."

A somewhat similar question was passed upon in the case of *United States* v. *Johnson Co.*, 9 Ct. Cust. Appls. 258, Treasury Decision 38215. Paragraph L, Section III, of the Tariff Act of 1913 (38 Stat. 185-186), provided a minimum value, in certain cases, of:

> "* * * the wholesale price at which such or similar imported merchandise is actually sold or freely offered for sale in usual wholesale quantities in the United States in the open market * * *"

less the appropriate deductions to reach a constructive foreign value. In construing this provision the court said, *inter alia:*

> "Inasmuch as the domestic sale price of 'such', the identical, merchandise is made evidence of the foreign market value in these cases, and 'such' never exists until the particular importation thereof is complete and sale made, the contention that only such domestic sales as were made *at the time of exportation* could be considered by appraising officers seems disposed of by the statute itself. The thing to be determined is 'market value' at the time of exportation, but in the absence of such Congress has prescribed how, with possibly later evidence only, appraising officers may *constructively* determine such market value."

When the Congress was considering the bill which became the Tariff Act of 1922, methods of valuation were fully discussed. The Committee on Ways and Means of the House of Representatives favored an American valuation system, based upon the wholesale selling price in the United States of comparable and competitive domestic products. When this bill, H. R. 7456, came to the Senate Committee on Finance, the opinions of that body were stated in Senate Report No. 595, 67th Congress, 2nd Session. At page 8 of this report appears the following:

> "Your committee, therefore, recommends that the value basis of existing law be continued and substituted for the American valuation plan embodied in the House bill. This basis for determining the value of imported merchandise includes the use of the export value of the merchandise in the country from which exported upon the date of exportation when it is higher than the foreign market value. Additional safeguards are recommended to further protect against undervaluation, and definitions have been phrased to require the ascertainment of values actually existing without recourse, except in extreme instances, to cost of production. For this purpose the definition of foreign market value has been amended so that where no foreign market value or export price exists in the country of exportation the price for dutiable purposes shall be the price of which such imported merchandise is sold in the United States less prescribed deductions."

Upon conference the House receded and the Senate amendment became part of the law.

The effect of the changes thus enacted into the Tariff Act of 1922 was to make United States value a mandatory value to be used before resorting to cost of production, rather than an advisory or a minimum value as in the previous acts. Furthermore, the word "sold" was omitted and the value based upon the price at which such or similar merchandise was "freely offered for sale". The definition

of United States value was reenacted without change in the Tariff Act of 1930.

The United States Court of Customs Appeals has held that "such" means the identical merchandise to be appraised. *United States* v. *Johnson Co., supra.* By its contruction of the definition of United States value in the case at bar, that court has written the word "such" out of the statute, since it has held that only previously imported merchandise, which may be "similar" but cannot be "such", can be used as the basis for determining United States value.

It is respectfully submitted that the natural and logical meaning of the statutory definition of United States value, and that which will effectuate the expressed intent of Congress not to resort to cost of production "except in extreme instances", is not that given to it by the Court of Customs and Patent Appeals. The true construction appears to be:

"The United States value of imported merchandise [that to be appraised] shall be the price at which such [the identical imported merchandise] or similar [in the event that such merchandise is not freely offered for sale to all purchasers] imported [but not domestic] merchandise is freely offered for sale [an offer may be for future goods], packed ready for delivery [merchandise may be offered in such condition although not presently so packed], in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise [that to be appraised], in the usual wholesale quantities and in the ordinary course of trade, * * *".

Imported merchandise can be freely offered for sale before its importation just as well as thereafter. To read into the statute the additional restriction that a stock of such or similar imported merchandise must be maintained in this country on the date of exportation of the merchandise to be valued is absolutely unwarranted.

POINT II

If the meaning given to the word "imported" by the court below is allowed to stand as correct, United States value, for all practical purposes, is deleted from the Tariff Act.

It is a matter of common knowledge that the importers of thousands of commodities for sale in this country at wholesale do not maintain stocks of these commodities. Few importers would normally take the risk of importing machinery, plant equipment, precision instruments or a multitude of other articles, storing them in a warehouse, and then hoping to find a purchaser for that particular article. Most importers do as was done in the instant case. The importer offered beer barrel washing machines of a certain type to possible purchasers for delivery in one month. A purchaser accepted such an offer. The importer ordered the machine from the foreign manufacturer and upon its arrival delivered it to his purchaser. Obviously the price at which he was freely offering such or similar machines at the date of exportation of the instant machine is an accurate measure of the value of such a machine in this country.

If, however, United States value is restricted to cases wherein stocks of imported merchandise are maintained in the United States for sale, such value will not exist in the vast majority of instances, contrary to the intent of Congress that United States value should be ascertainable in almost every case.

Furthermore, the confusion resulting from the decision of the court below will be enormous. Appraisers of merchandise at the ports throughout the country would have to check on hundreds, if not thousands, of commodities daily to ascertain whether someone had a stock of such or similar imported merchandise somewhere in the United States which was being freely offered for sale at the date

of exportation of the merchandise to be appraised. Importers, with much more limited sources of information, would be faced with a task actually impossible in many instances, and yet would be subject to the heavy statutory penalties if they improperly valued their merchandise upon entry.

As an example of uncertainty which would result from the decision of the court below, we note that one imported machine was on exhibition in New York for ten days before it was sold on October 4, 1934 (R. 30). According to that court, any such machines exported to the United States between September 24 and October 4, 1934 would be dutiable upon United States value, since this unsold imported machine was physically present in New York. But, following this theory, exportations after October 4, 1934 must revert to the cost of production method of valuation until another unsold machine was imported for stock.

If this interpretation is placed upon the word "imported" as used in the definition of United States value, the importer could select the more favorable basis of valuation—either United States value or cost of production—as he chose, by having a similar article available in stock on the date of exportation, or by maintaining no stock, or refusing to offer it, on the date of exportation. The basis of value for imported merchandise would change from day to day or from week to week. Such ephemeral bases of valuation are entirely illogical.

Of the two possible interpretations of the word "imported" as used in the definition of United States value, that should be adopted which expresses the intent of Congress and which makes the law reasonable and usable. That is, United States value should be based upon offers to sell such or similar imported merchandise, as contrasted with domestic merchandise, but it is immaterial whether or not the merchandise so offered was physically present in the United States at the date of exportation of the merchandise to be valued.

Conclusion.

The granting of a writ of certiorari in this case is appropriate since the construction of an important Federal statute is involved, since the construction placed upon it by the court below is contrary to the indicated intent of Congress, will result in great confusion for both Government appraising officers and for importers, and affects the rights of the majority of all importers.

WHEREFORE, it is respectfully prayed that a writ of certiorari issue.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

THE UNITED STATES, Appellant, v. COLLIN & GISSEL (LUDWIG BAER), Appellee.	October Term, 1940. Customs Appeal No. 4312. Customs Calendar No. 17.

GARRETT, Presiding Judge.

This is an appeal by the Government from the judgment of the United States Customs Court, Third Division, affirming that of the trial judge in a reappraisement proceeding involving the dutiable value of a machine for washing beer barrels imported from Germany and entered at the port of Houston, Texas, August 10, 1934.

The local appraiser appraised the machine on the basis of cost of production, returning as the amount thereof the sum of 12,511.30 reichsmarks net, packed. Upon appeal the trial judge held United States value to be the proper dutiable value, fixing the amount of such value at $3,529.92. It is conceded by the Government that if United States value be the proper dutiable basis, the amount so fixed is correct.

Collin & Gissel, who made the entry, appears to have been a customs brokerage firm, and the actual party in interest is an individual, Ludwig Baer by name, who was the exclusive United States selling agent of the foreign manufacturer. It is conceded that no export value existed for the machine.

It was contended by the Government below, and this seems to have been its principal contention there, that the merchandise had a foreign value, or at least that the importer failed to negative the existence of such and, therefore, it was moved and argued that the court should dismiss the importer's appeal, thus leaving the local appraiser's appraisement in effect. Before us, however, it is conceded that there is some substantial evidence to support the finding of the tribunals below that there was no foreign value. In consequence, no issue respecting foreign value is before us.

The Government brief declares:

> The question here presented is whether this machine is dutiable on the basis of United States value, as defined in Section 402(e), or cost of production, as defined in Section 402(f), of the Tariff Act of 1930.

The statutes so named read:

> (e) UNITED STATES VALUE.—The United States value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale, packed ready for delivery, in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise, in the usual wholesale quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery, a commission not exceeding 6 per centum, if any has been paid or contracted to be paid on goods secured otherwise than by purchase, or profits not to exceed 8 per centum and a reasonable allowance for general expenses, not to exceed 8 per centum on purchased goods.
>
> (f) COST OF PRODUCTION.—For the purpose of this title the cost of production of imported merchandise shall be the sum of—

Appendix.

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

In a reappraisement proceeding we are bound by the findings of fact below whenever there is any substantial evidence to support such findings and our concern is confined to such question or questions of law as may be presented. So, in the instant case there is no occasion for a detailed review of all the evidence.

However, the Government has presented a legal theory here which, so far as we can determine from the record, was not suggested below and, for an understanding of our decision, it seems necessary to state certain facts more elaborately than either the trial judge or the appellate

division had occasion to state them. It will be understood, of course, that in so doing our statement is not inconsistent with any finding of fact made below.

The importer does not keep a stock of the machines on hand in the United States, but ordinarily contracts with United States customers for their sale and then places an order with the foreign manufacturer. When a machine so ordered arrives, it is invoiced to a purchaser by the importer, and shipped or delivered to such purchaser from the port of entry.

The importer testified:

> A. Well, we make a contract on a certain date and then give shipping orders. Shipment is to be made two, three, or four weeks after. Naturally, we ship the machine from here, and we make the invoice date at the time we ship here.

He testified that from January 1, 1934, to June 1934 he freely offered the machines for sale to all purchasers in the United States at the price of $6,000 per machine, and from June 1, 1934, to September 1934 at the price of $5,500. He produced from his books a list of invoices which were received in evidence, he testifying that they were actual carbon copies of original invoices sent by him to purchasers in the United States during the year 1934. From these invoices both parties in their respective briefs before us present certain tabulated statements. They are not arranged in precisely the same form, but the differences are immaterial so far as the issue before us is concerned. There is no disagreement as to the essential facts which the papers disclose.

The table appearing in the brief on behalf of the Government shows in different columns the dates of contracts made in the United States, dates of the consular invoices (which are taken as the dates of exportation from the for-

eign country) dates of shipments from the United States ports of entry to the brewery companies, the number of machines in each shipment, the sales prices in the United States, and the purchasers to whom the importer shipped the machines.

It may be said that in five instances the contracts of sale and the exportations from the foreign country were made in the latter part of 1933, but the shipments to the United States purchasers from the entry ports were made in 1934, the last being March 16, 1934. It appears that three of the machines included in the list were damaged machines, sold at the price of $4,500 each. It appears also that four of the transactions took place, respectively, in October, November, and December 1934.

The machine here involved was one sold by the importer to Harry Mitchell Brewing Company. The contract for sale of a machine to it is stated to have been made June 26, 1934. It was exported from Germany, according to the date of the consular invoice, July 11, 1934, and entered at the port of Houston, Texas, August 10, 1934, on which date it was invoiced, and shipped, to the purchaser.

It is the contention of the Government that the five transactions above stated, beginning in the latter part of 1933 and ending March 16, 1934, and the four which took place subsequent to August 10, 1934, may not be considered in connection with the issue before us. We do not understand from the decisions below that they were there considered on the question of value. They were merely referred to in discussing the course of the importer's business. The transactions involving the damaged machines, as of course, are not pertinent and they were not considered below.

We find in the tables printed in the briefs of both parties one transaction in which a machine was shipped from the port of entry to another purchaser (Croft Brew-

ing Company) on the same date—August 10, 1934—as that upon which the involved machine was shipped to Harry Mitchell Brewing Company. The contract for its sale in the United States bears date of July 17, 1934, and the consular invoice indicating the date of its exportation bears date of July 24, 1934. In another instance a contract of sale was made July 13, 1934, the machine being exported from the foreign country July 17, 1934, and shipped to the purchaser (P. Ballantine & Sons) August 6, 1934. In another case a contract of sale bears date of June 26, 1934 (the same date as that of the contract respecting the machine at bar); the export date is given as June 30, 1934, and the date of shipment to the purchaser (Hittleman Goldenrod Brewing Company) from the port of entry as July 18, 1934.

These four transactions are the only ones listed as having taken place during the period from June 1, 1934 to September 1934, the period during which the importer, Baer, testified that he was freely offering the machines for sale at the price of $5,500 each. We regard them as being the only transactions furnishing any substantial evidence in anywise pertinent to the instant controversy. When they are analyzed with reference to the exportation date of the machine here involved—July 11, 1934—it will be observed (1) that the machine purchased by Croft Brewing Company was entered August 10, 1934, practically one month after July 11, 1934, and immediately invoiced to the purchaser; (2) that the machine purchased by P. Ballantine & Sons was entered August 6, 1934, more than three weeks after July 11, 1934, and immediately invoiced to the purchaser; and (3) that the machine purchased by Hittleman Goldenrod Brewing Company was entered July 18, 1934, seven days after July 11, 1934, and immediately invoiced to the purchaser.

So, there is no showing of record that at *the time of exportation* of the involved machine, there was any similar imported machine in the United States which was being freely offered for sale.

In the case of *United States* v. *G. W. Sheldon & Co.*, 23 C. C. P. A. (Customs) 245, 249, T. D. 48108, referring to the matter of United States value there involved, we said:

> The said value is the price at which such or similar imported merchandise is *freely offered for sale,* packed, in the principal market of the United States, to all purchasers, *at the time of exportation* of the merchandise which is being valued. This could, of course, be established only by such or similar goods which had been previously imported and were being freely offered for sale at the time of export of the goods being valued.

In our decision in the case of *The Stern Hat Co.* v. *United States,* 26 C. C. P. A. (Customs) 410, C. A. D. 48, the above rule was restated with approval.

Upon the basis of those decisions and others, together with the facts as stated, the Government argues before us that there were no prototype machines which had been imported prior to the date of exportation of the involved machine that can be resorted to as a basis for determining United States value.

Specifically, the Government raises this question by Nos. 7 and 8 of its assignment of errors, which read as follows:

> 7. In failing to find and hold, as a matter of law, that since no identical or similar *previously imported* machines were being offered or sold in the principal market of the United States on the date of exportation herein, no statutory United States value exists for this importation.
>
> 8. In failing to find and hold, as a matter of law, that since all offers and sales of such or similar ma-

chines in the principal market of the United States, during the export period herein were for machines to be imported in the future, no statutory United States value exists for this importation.

As has been indicated, the legal theory presented in the foregoing assignments, was never, so far as the record discloses, suggested to the tribunals below. It was not referred to in the Government's motion to dismiss the appeal; the decision of the trial judge gives no indication that it was ever suggested to him; the Government's assignment of errors in connection with its appeal to the appellate division contains no intimation of it, and no petition for a reconsideration by the appellate division of its decision was presented.

It is always a matter of regret to us to be called upon to pass upon questions not presented to the trial court. This is particularly true in reappraisement proceedings, because of the statutory provision which confers upon the single judge and the appellate division of the Customs Court exclusive jurisdiction in finding facts.

Where, however, the questions newly presented to us have been questions of law only, it has been our practice to consider and determine them. *United States* v. *Massce & Co.*, etc., 21 C. C. P. A. (Customs) 54, T. D. 46379; *United States* v. *Briones & Co., Inc.*, 22 C. C. P. A. (Customs) 245, T. D. 47158; *United States* v. *Rodier, Inc.*, 23 C. C. P. A. (Customs) 336, T. D. 48196. For examples of cases in which we have declined to consider certain newly raised questions for reasons stated in the opinions, see *United States* v. *Freedman & Slater, Inc.*, 25 C. C. P. A. (Customs) 112, T. D. 49241; *United States* v. *Fisher Scientific Co.*, 26 C. C. P. A. (Customs) 278, C. A. D. 27.

No one of the above cases was on all fours with the instant case upon the question now under discussion, but they serve as illustrations of our practice.

Appendix.

In connection with this subject matter we deem it not improper to direct attention to the decision of the Supreme Court of the United States in the case of *Jay C. Hormel* v. *Guy T. Helvering, Commissioner of Internal Revenue,* 312 U. S. , rendered March 17, 1941.

In the instant case the newly presented question is, as we view it, solely one of law. The facts relative to the transactions and the course of business appear to have been fully shown. Appellee has made no point as to its being presented here *de novo,* but has accepted and argued the issue as presented by the Government, and we deem it proper to consider and decide it.

The brief on behalf of the Government states:

> It has been held consistently that the tariff definition of United States value refers to the price in this country of *prototype imported* merchandise on the export date of the merchandise being appraised, and that the deductions allowed by the statute also refer to expenditures, profits, etc., entering into the price at which the prototype imported merchandise was then offered. *United States* v. *Carbic Color & Chemical Co.,* T. D. 40859, 47 Treas. Dec. 526; *United States* v. *American Aniline Products, Inc.,* 22 C. C. P. A. (Customs) 380, T. D. 47399; *United States* v. *G. W. Sheldon & Co.,* 23 C. C. P. A. (Customs) 245, T. D. 48108; and *The Stern Hat Co.* v. *United States,* 26 C. C. P. A. (Customs) 410, C. A. D. 48.
>
> In the cases of *United States* v. *G. M. Sheldon, supra,* and *The Stern Hat Co.* v. *United States, supra,* this court pointed out further that only offers and sales of prototype merchandise which had been imported *previous* to the export date involved can be considered as a basis for arriving at United States value under Section 402 of the tariff acts, but that offers or sales in this country, on or about the export date for *future importation* and delivery, are *not* a proper basis for determining United States value.

Therefore, inasmuch as there was no "such or similar" machine imported into the United States previous to the date of exportation of the involved machine which was being freely offered for sale at such time (all previously imported machines having been already sold) it is argued by Government counsel that under the principle announced in the cited cases, there was no basis upon which United States value could be determined.

It is contended on behalf of appellee, in substance, that continuous *bona fide* offers to sell and frequent sales in the United States of identical imported merchandise form the basis of United States value, and various authorities are cited and discussed. It is said that the Congress changed the wording of the definition of United States value in framing the Tariff Act of 1922, when the definition embraced in the 1930 act was first stated, to avoid basing such value of merchandise upon its own selling price, as was the previous practice, and it is conceded that United States value may not form a basis for dutiable value of a first importation of a type of merchandise "since there is no prototype imported merchandise in existence," but it is urged that when the course of business is of the kind here involved United States value was created by the procedure which may be taken as the basis of dutiable value.

We are unable to concur in this view. No imported machine was in the United States available to be offered for sale by the importer at $5,500, or at any other price, on July 11, 1934, the date of exportation of the involved machine, nor at any time near that date. The statute defining United States value explicitly states, "The United States value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale * * * in the principal market of the United States to all purchasers, at the time of exportation of the

imported merchandise * * *," and it was definitely construed by us in the *Sheldon & Co.* case, *supra,* in the manner already stated. Clearly, had the importation here involved been a first importation of the particular type of merchandise at issue no United States value could be determined under the statutory definition which Congress adopted and, there being no prototype machine in the United States at or near the date of exportation of the involved machine available for offer, a fundamental element of United States value, as defined by the statute, was lacking. Upon the facts shown, in our opinion, no legal distinction can be drawn between the importation involved and a case of first importation.

The brief on behalf of appellee suggests that the facts in the *Massce & Co.* case, *supra,* were somewhat similar to those in the instant case. A careful study of our decision there discloses that the issue here involved was not present in that case, and we held nothing there which is inconsistent with our holding here. With respect to the pertinent principle involved, this case is not, as we view it, distinguishable from the *Sheldon & Co.* case, *supra,* the pertinent rule in which was restated in *The Stern Hat Co.* case, *supra.*

One other question requires notice. The trial judge specifically held, in effect, that there was no substantial evidence to support the local appraiser's finding of cost of production, and the appellate division said:

> It is noted, also, that the appraiser in the instant case stated that he appraised on the basis of cost of production because he could not satisfactorily determine the existence of a foreign or export value. He did not state that he could not find United States value. The statute, section 402, *supra,* provides that the cost of production method can be resorted to only when the foreign, export, or United States values can-

not be satisfactorily ascertained. There is no proof that the appraiser could not ascertain the United States value, and therefore, upon the record, he was without authority to adopt the cost of production.

It is deemed sufficient to say that the presumption of correctness made applicable by express provision of the statute to the appraiser's finding of dutiable value is applicable here, the importer having failed to establish any other legal basis for determining dutiable value. The case of *United States* v. *V. M. Davis, Sinai Kosher Sausage Factory,* 20 C. C. P. A. (Customs) 305, T. D. 46087, differed from the instant case in principle and is not here controlling.

In view of the fact that our decision upon the question of law not raised below is decisive of the case, it is unnecessary to discuss other questions suggested.

The judgment of the United States Customs Court is reversed.

Reversed.

Lenroot, J., did not participate in the consideration and decision of this case.

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419645—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 597

COLLIN & GISSEL (LUDWIG BAER), PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the trial court (R. 87) is reported in R. D. 4580, 2 Cust. Ct. 957. The opinion of the appellate division of the United States Customs Court (R. 100) is reported in R. D. 4723, 4 Cust. Ct. 622. The opinion of the United States Court of Customs and Patent Appeals (R. 107–116) is reported in C. A. D. 176, 77 Treas. Dec. Advance Sheets No. 3 (July 17, 1941), p. 22.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on June

9, 1941 (R. 117). The petition for a writ of certiorari was filed on September 9, 1941. The jurisdiction of this Court is invoked under section 195 of the Judicial Code as amended (U. S. C. Title 28, sec. 308).

QUESTION PRESENTED

Petitioner exported a beer barrel washing machine from Germany on July 11, 1934, and imported it at Houston, Texas, on August 10, 1934. Although petitioner had sold and imported a number of these machines both before and after July 11, 1934, no such machines then in the United States were for sale on that date. The question is whether at the time of exportation such machines were freely offered for sale, so that their United States value could be fixed under section 402 (e) of the Tariff Act of 1930.

STATUTES INVOLVED

The pertinent parts of the statutes involved are set forth in the Appendix, *infra,* pp. 7–12.

STATEMENT

Petitioner, the exclusive agent for beer barrel washing machines in the United States, imported such a machine at the port of Houston, Texas, on August 10, 1934 (R. 6, 8). The machine had been exported from Germany on July 11, 1934 (R. 9, 11). Petitioner's practice was to contract to sell these machines, and thereafter to have the machines so ordered exported from Germany to fulfill

the contract (R. 10). Petitioner had sold, exported and delivered such machines in the United States some time prior to July 11, 1934, and up to March 16, 1934; petitioner also sold and had exported some machines within a two- or three-week period surrounding July 11, 1934; and some it sold considerably after that date (R. 69–74; 110–112). No machines then in the United States were for sale on July 11, 1934 (R. 10, 74, 112), and, so far as the record shows, no machines in the United States were at any time offered for sale after their importation (R. 10).

The machine in controversy was appraised at the port of entry at Reichmarks 12,511.30 ($5,045.80) net, packed, on the basis of its cost of production as defined in section 402 (f) of the Tariff Act of 1930 (*infra,* pp. 8–9), (R. 8, 15, 193). Petitioner appealed for reappraisement claiming that the machine had a United States value, as defined in section 402 (e) of the Act, *infra,* and, consequently, that the cost of production could not be resorted to under section 402 (a), *infra.*

The trial court held that no foreign or export value existed for the machine; that statutory United States value did exist; that United States value was the proper basis for appraisal, and that the proper value thereof was $3,529.92 (R. 87–95). On review by the appellate division of the Customs Court, the judgment of the trial court was affirmed (R. 100–106). On appeal to the Court of Customs and Patent Appeals, the judgment of the appellate

division of the Customs Court was reversed on the ground that evidence of offers to sell merchandise which had not been imported on or prior to the date of exportation of the merchandise being appraised, was incompetent to show United States value as defined in section 402 (e), *infra* (R. 107–116). The judgment below, in effect, reinstates the value as found by the appraiser on the basis of the cost of production.

ARGUMENT

The machine in controversy was subject to an *ad valorem* rate of duty; the issue concerns its correct valuation for the purpose of assessing duty on it. Section 402 (a) of the Tariff Act of 1930, *infra,* provides that for duty purposes the value of imported merchandise shall be foreign or export value, whichever is higher. But if neither of these values can be satisfactorily ascertained, then the value shall be the United States value as defined in section 402 (e), *infra.* If none of these values can be ascertained, then the value shall be the cost of production. Since it is now conceded that neither export nor foreign value existed (R. 108),[1] the controversy is limited to whether the appraisal should have been based on United States value.

Section 402 (e) of the Tariff Act of 1930 provides that the United States value shall be the

[1] The Government originally contended that the merchandise had a foreign value, but this contention was abandoned in the court below (R. 108).

price at which such or similar *imported* merchandise is freely offered for sale in the United States, with prescribed allowances. The court below, following its prior decisions in the cases of *United States* v. *G. W. Sheldon & Co.,* 23 C. C. P. A. (Customs) 245, and *The Stern Hat Co.* v. *United States,* 26 C. C. P. A. (Customs) 410, held that on July 11, 1934, no machines then imported into the United States were for sale and that only offers for sale of prototype merchandise which had been actually imported previous to the export date involved could be considered as a basis for United States value. In these circumstances, United States value could not be ascertained and the valuation basis was necessarily the cost of production.

It has long been held by this Court that the term "imported merchandise" when used in tariff statutes means merchandise which arrives in the United States from foreign countries, unless the Congress by clear expression shows a contrary intention. *Marriott* v. *Brune,* 9 How. 619; *Lawder* v. *Stone,* 187 U. S. 281. The provision of law defining United States value first appeared as section 402 (d) of the Tariff Act of 1922, 42 Stat. 858, 949, and was reenacted in the Tariff Act of 1930, 46 Stat. 590. There is nothing in the legislative history of either act to show that the term was used by Congress in a sense contrary to that expressed above.[2] In the light of the decisions of this

[2] See S. Rept. 595, 67th Cong., 1st sess.; H. Rept. 7 and S. Rept. 37, 71st Cong., 1st sess.

Court, the construction of the court below that under section 402 (e) merchandise must be actually imported before offers to sell may be used as a basis to ascertain United States value is reasonable. Although the Government had in earlier cases urged in the court below a contrary construction, the instant decision does not appear to be of sufficient present importance to warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1941.

APPENDIX

STATUTES

Tariff Act of 1930, 46 Stat. 590, 708–710, sec. 402:

SEC. 402. VALUE.

(a) *Basis.*—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) * * *

(b) *Review of appraiser's decision.*—A decision of the appraiser that foreign value, export value, or United States value can not be satisfactorily ascertained shall be subject to review in reappraisement proceedings under section 501; but in any such proceeding, an affidavit executed outside of the United States shall not be admitted in evidence if executed by any person who fails to permit a Treasury attaché to inspect his books, papers, records, accounts, documents, or correspondence, pertaining to the value or classification of such merchandise.

(c) *Foreign value.*—[definition] * * *

(d) *Export value.*—[definition] * * *

(e) *United States value.*—The United States value of imported merchandise shall be the price at which such or similar *imported* merchandise is freely offered for sale, packed ready for delivery, in the principal market of the United States to *all* purchasers, at the *time of exportation of the imported merchandise,* in the usual *wholesale* quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery, a commission not exceeding 6 per centum, if any has been paid or contracted to be paid on goods secured otherwise than by purchase, or profits not to exceed 8 per centum and a reasonable allowance for general expenses, not to exceed 8 per centum on purchased goods. [Italics ours.]

(f) *Cost of production.*—For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

(g) *American selling price.*—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

SEC. 501. NOTICE OF APPRAISEMENT—REAPPRAISEMENT.

The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value. The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this Act relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall, after affording the parties an opportunity to be heard, determine the value of the merchandise. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose

attendance cannot reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. *The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.*

The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decision in writing together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United States Customs Court by the collector or other person authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision

of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the finding is based and the reasons therefor. The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided by section 198 of the Judicial Code, as amended. [Italics ours.]

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